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Employment Law BULLETIN

Welcome to our January employment law bulletin.

After the employment tribunal decision in *Aslam & Others v Uber BV & Others* (the Uber taxi case) the rights of individuals supplying services to companies within the so-called 'gig economy' are very much under the spotlight. Are such individuals employees, workers, or truly in business on their own account? Employment tribunals are examining these relationships and finding, in some cases, that such individuals are 'workers', at the very least, thus entitling them to holiday pay and the national minimum wage.

In *Dewhurst v CitySprint UK Ltd* an employment tribunal has also found that a bicycle courier for CitySprint was not self-employed (as described) but rather, was a worker, and so entitled to holiday pay. In a different context, in *RS Dhillon & GP Dhillon Partnership v HMRC* the First Tier Tribunal has upheld an HMRC decision that individuals working for a company providing drivers for the construction industry were incorrectly described as self-employed and that, as a result, PAYE and national insurance contributions should have been deducted.

In *Stratford v Auto Trail VR Ltd* the EAT has upheld a finding of an employment tribunal that an employee was fairly dismissed (in the circumstances of that case) despite the employer taking into account a number of expired disciplinary warnings.

In *Kellogg Brown & Root (UK) Ltd v Fitton & Ewer* the EAT has confirmed a decision of an employment tribunal that the dismissal of two employees who refused to transfer offices was unfair. The individuals were contractually mobile and therefore not redundant when the relocation was imposed by their employer. But their dismissal for refusing to move was unfair in the circumstances.

In *Taylor v Ladbrokes Betting & Gaming Ltd* the EAT considered whether type 2 diabetes could be a 'progressive condition', thus qualifying as a disability under the Equality Act 2010. The EAT stressed that it was important to address not only the current impact of diabetes on the employee, but also the likely future impact of the condition, in determining whether the individual had a disability for the purposes of the legislation.

In *DWP v Brindley* the EAT held that an existing employee who had entered into an ACAS COT3 settlement with her employer after bringing a disability discrimination claim could, nonetheless, bring a further claim relating to new facts. The wording of the COT3 agreement in this particular case did not bar-off this new claim.

May I also remind you of our forthcoming events:

Click any event title for further details.

In conjunction with ACAS

Simplifying TUPE in a day: Understand the rules and avoid the pitfalls

- Full day conference, Leeds, 22nd February 2017

Understanding TUPE: A practical guide to business transfers and outsourcing

- Full day conference, Newcastle-upon-Tyne, 9th March 2017

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1: Employment tribunal finds bike courier was a worker and entitled to holiday pay

In *Dewhurst v CitySprint UK Ltd* ET/220512/2016, an employment tribunal determined that Ms Dewhurst, a bicycle courier for CitySprint, was not self-employed (as CitySprint maintained), but was rather a worker, and so was entitled to two days' holiday pay. This case has similarities with the Uber taxi case heard by an employment tribunal in October 2016.

The CitySprint decision was based on the tribunal's finding that the written terms of the contract between the couriers and the company, entitled "Confirmation of Tender to Supply Courier Services", did not reflect the reality of the situation on the ground. This contract stated that couriers were "self-employed" and that CitySprint had no obligation to provide work to the courier, and the courier had no obligation to accept it. It stated the courier could provide a substitute person to carry out assignments. It also stated that the courier was not entitled to holiday pay, maternity pay or sick pay. Under the contract, payment of the couriers was purportedly through an invoice system.

The tribunal found that, in reality, couriers never provided substitutes to carry out the work, invoices were not submitted, couriers were controlled by CitySprint and were integrated into the company. For example they were instructed to smile as part of providing a professional service, and had to wear a uniform. The tribunal found that couriers had to log in to CitySprint's tracking system and to log out at the end of the day. They were expected to carry out the work once they had logged on. The couriers were found to have little autonomy and could not, according to the tribunal, be said to be self employed.

On these facts, Ms Dewhurst was found to be a worker for the periods during which she was logged in to the tracker system.

This is a first instance case and does not set a precedent. It may be appealed by CitySprint. A number of other similar bicycle courier cases are due to be heard in the Employment Tribunal in the coming months. The rights of individuals who supply services in the so-called "gig economy" will continue to give rise to litigation.

2: First Tier Tribunal upholds HMRC decision that haulage drivers are employees

In ***RS Dhillon and GP Dhillon Partnership v HMRC,*** the First Tier Tribunal of the Tax Chamber found that drivers were incorrectly described as self-employed and the Dhillons' appeal was dismissed.

The Dhillons provided haulage drivers for the construction industry. Their dealings with customers were detailed in written franchise agreements. The contract between the Dhillons and the drivers was not evidenced in any written documents. Drivers were treated by the Dhillons as self-employed contractors so that PAYE tax and National Insurance contributions (NICs) were not deducted from payments to the drivers. An HMRC assessment found that the drivers were employees of the Dhillons and that PAYE and NICs should have been deducted. The Dhillons appealed to the First Tier Tribunal.

The tribunal began by applying various employment status tests from decided case law (following guidance in *Mitchell and another v HMRC* (2011) UKFTT 172).

First, the tribunal considered the level of control exercised by the partnership over the drivers. It found that this test was inconclusive as some of the control exercised over the drivers was in the hands of the Dhillons' customers.

Secondly, it considered whether there was a mutuality of obligation between the partnership and the drivers. It found that there was mutuality of obligation on each assignment. That is, once an assignment had been offered and accepted by a driver, the partnership was obliged to provide work and the driver was obliged to carry it out. However, the tribunal found that the drivers could turn down work when offered.

Thirdly, the tribunal considered whether a driver could send a substitute to carry out the work. It found that it was permitted for a substitute driver to be sent under the franchise agreement. However it found that the power of substitution was limited because this power in the franchise agreement was only possible where there was customer approval of the substitute driver beforehand.

Fourthly, the tribunal considered whether the drivers were in business on their own account. It found that the drivers were not in business on their own account because the partnership provided the lorries, the drivers did not take any financial risk and they did not profit from "sound management in the performance of their task". The drivers were paid fixed amounts for day shifts and night shifts and could not influence how much profit they derived from making a delivery.

Fifthly, the tribunal considered whether it was the common intention of the parties that the drivers should be self-employed contractors. But as there was no written contract between the Dhillons and the drivers, there was no evidence that the parties intended a client-contractor relationship.

Applying the case of *Hall v Lorimer* [1993] EWCA Civ 25, the tribunal finally looked at the relationship between the parties in the round. It concluded that the drivers were employed on short-term employment contracts as in reality the Dhillons dictated the terms of the relationship and there was no evidence that the drivers were self employed.

This is a tax case rather than an employment law case. Employers should note that a finding by HMRC or the First Tier Tribunal that someone is or is not self-employed will not necessarily mean that an employment tribunal would agree. Having said that, this case is a useful guide to the way in which an employment tribunal would work through the various tests of employed and self-employed status, applying each to the facts and considering the reality of the relationship in the round.

3: A dismissal which took into account expired disciplinary warnings was fair

In ***Stratford v Auto Trail VR Ltd,*** the EAT upheld the decision of an employment tribunal that an employee had been fairly dismissed despite the employer taking into account a number of expired disciplinary warnings.

Mr Stratford had a poor disciplinary record which comprised 17 different incidents. Despite this, he had no live warnings on record at the time of the disciplinary proceedings which led to his dismissal. Mr Stratford was dismissed for using his mobile phone on the factory floor. Use of a mobile while on the shop floor was strictly prohibited by Auto Trail's disciplinary policy. Mr Stratford was dismissed with pay in lieu of notice. The dismissal letter stated that the offence was not gross misconduct and would warrant a final written warning. However Mr Stratford's poor disciplinary record was taken into account, as was the dismissing officer's belief that he would continue to breach disciplinary rules in the future.

Mr Stratford brought an unfair dismissal claim before an employment tribunal. The tribunal found that the employer was entitled to consider the claimant's disciplinary record and his attitude to discipline in general. The tribunal decided that the employer was entitled to decide that "enough was enough". The tribunal dismissed the claimant's claim.

The EAT agreed with this approach. It considered the decisions in *Diosynth Ltd v Thomson* (2006) IRLR 284 and *Airbus Ltd v Webb* (2008) EWCA Civ 49. The EAT made clear that a tribunal could

find a dismissal for misconduct was fair even when expired warnings had been taken into account when making the decision to dismiss. It clarified that previous misconduct, expired warnings and an employer's expectation that an employee would go on to breach disciplinary rules in the future could all be circumstances to be taken into account when considering whether the employer acted reasonably in treating the conduct as a sufficient reason to dismiss.

This case highlights that there is no hard and fast rule that an employer cannot take expired warnings into account when making a decision to dismiss. A tribunal will consider all the circumstances of the dismissal and come to a conclusion as to whether the employer was reasonable to dismiss in those circumstances. However, there are clearly risks for employers who take expired warnings into account where misconduct would not otherwise have given rise to a dismissal, as it is difficult to predict the decision of a tribunal as to the reasonableness of an employer's decision in these circumstances.

4: Dismissals following employees' refusal to relocate were unfair

In ***Kellogg Brown and Root (UK) Ltd v Fitton and Ewer,*** the EAT upheld the finding of an employment tribunal that the dismissal of two employees who refused to comply with their employer's request that they relocated offices was fair.

Mr Fitton and Mr Ewer worked for Kellogg Brown (an engineering, construction and technology company) at its Greenford office. A widely drafted mobility clause in their employment contracts provided that Kellogg Brown could require them to work at any new office location in the UK or overseas either temporarily or permanently. Under the contract, the employees were bound to comply with this requirement unless there were exceptional circumstances.

Kellogg Brown took the decision to close the Greenford office and informed employees that they would transfer to the Leatherhead office. Kellogg Brown set up a scheme to assist transferring employees which included allowing additional travel expenses and the reduction of core working times. Some employees received a redundancy payment where there were exceptional circumstances including childcare and other caring responsibilities.

Mr Fitton and Mr Ewer refused to transfer offices on the grounds that the increased travel time was unreasonable. Both argued that they should be paid a redundancy payment. The employer refused to accept there were exceptional circumstances justifying the objection. Kellogg Brown commenced disciplinary proceedings against the employees. Both were summarily dismissed for refusing to follow a reasonable instruction. The employees brought claims for unfair dismissal and a statutory redundancy payment in an employment tribunal.

The tribunal found that the mobility clause lacked certainty. The judgment stated that it was not clear when the circumstances of an employee could be found to be exceptional by the employer; and that the clause was too widely drafted. The tribunal found that the instruction to transfer offices was unreasonable given the increased travel time (in one case entailing a two hour commute). It found that the steps to mitigate effects on employees were of no assistance to the claimants. The tribunal also took into account Mr Ewer's approaching retirement, his long service and his long-term connection to the place in which he lived. The tribunal found that the dismissals were by reason of redundancy and that they were unfair.

The EAT disagreed that the reason for the dismissal was redundancy. As the employees were contractually mobile, no "disappearing workplace" redundancy arose. It held that the real reason for the dismissal was alleged misconduct (the refusal to obey a reasonable instruction/to comply with the contractual mobility clause). It held that the tribunal had found that Kellogg Brown believed it could rely on the mobility clause and believed that the instruction to transfer offices was reasonable. In both cases, the employees were dismissed because of their refusal to transfer offices and not because of redundancy.

The EAT did, however, agree that the dismissals were unfair. It agreed with the employment judge that the instruction to move offices was not justified. It also agreed that the instruction was not reasonable and that the employees' refusal to transfer was reasonable in the circumstances.

In the case of *United Bank v Akhtar* (1989) IRLR 507, it was made clear that a contractual mobility clause could not allow an employer unreasonably to ask an employee to move workplace, for example by giving little notice of the move. Employers should ensure that any reliance on such a mobility clause is reasonable and take steps to ensure that the exercise of such contractual rights does not breach the implied duty to maintain trust and confidence.

5: Type 2 diabetes could be a progressive condition qualifying as a disability under the Equality Act 2010

In ***Taylor v Ladbrokes Betting and Gaming Ltd***, the EAT considered whether Type 2 diabetes could be a progressive condition qualifying as a disability under the Equality Act 2010. The EAT allowed the employee's appeal, given that the medical evidence had focused mainly on the current impact of the condition on the claimant's ability to carry out day-to-day activities, rather than on the likely future effects of the condition on his abilities. The EAT also considered whether a tribunal should take into account the claimant's reasonable conduct in managing the condition by means of lifestyle and diet.

Mr Taylor, who suffers from type 2 diabetes, was employed by Ladbrokes until his dismissal in November 2013. He brought claims before an employment tribunal for unfair dismissal and disability discrimination. A preliminary hearing found that he was not disabled.

The medical evidence stated that, even if Mr Taylor did not take medication, the condition would not have had a substantial adverse impact on Mr Taylor's ability to carry out normal day-to-day activities at the time of his dismissal. The consultant also stated that the condition could be controlled through diet, lifestyle and exercise. He gave his opinion that Mr Taylor had not taken reasonable steps to change his lifestyle in order to control the condition.

People who suffer from a condition which is likely to deteriorate in the future (a progressive condition) are protected by discrimination legislation. Such people are deemed to be suffering from a disability even before the condition results in a substantial adverse impact on their ability to carry out day-to-day activities.

Government guidance on the Equality Act 2010 (*the Guidance*) states that someone who has a progressive condition "will be treated as having an impairment which has a substantial adverse effect from the moment any impairment resulting from that condition first has some adverse effect on his or her ability to carry out normal day-to-day activities, provided that in the future the adverse effect is likely to become substantial".

The Guidance states that where someone might reasonably be expected to modify their behaviour to reduce the effects of an impairment on their normal day-to-day activities, they may not be deemed to be disabled. In this case the employment tribunal considered whether Mr Taylor had taken the basic steps to control his diabetes which might reasonably have been expected of him.

The EAT however found that it is not appropriate to take into account what the claimant might reasonably be expected to do when considering a progressive condition. It clarified that the proper question is whether the condition is likely to result in the claimant having a substantial impairment in the future. In this case the medical evidence had focused mainly on the current impact of diabetes on the claimant, rather than considering the likely future impact. The EAT found that the employment judge had not properly addressed the question of whether Mr Taylor had a progressive condition. The medical evidence on future prognosis was insufficiently clear to decide on this point.

This case highlights the importance of asking the right questions of medical experts. Here, the failure to focus on future impact of the condition gave rise to uncertainty about whether the employee was disabled.

6: Wording of COT3 agreement was not wide enough to bar discrimination claim arising from new facts

In *DWP v Brindley*, the EAT held that an existing employee who had entered into a COT3 with her employer after bringing a disability discrimination claim could bring a further claim relating to new facts.

Mrs Brindley is an employee of the Department of Work and Pensions (DWP). Due to a reorganisation, she lost her long-standing disabled parking space at work. She then had a period of sickness absence which she reported was due to stress about the lack of a parking space worsening her condition. The DWP attendance management process was triggered and she received a final written warning on 11 April 2014. She then brought a disability discrimination claim (Claim 1) in the Employment Tribunal.

The parties signed a COT3 in December 2014 in full and final settlement of Claim 1 and all other "Relevant Claims arising from the facts of the Proceedings up to and including the date of this Agreement". Relevant Claims were defined to include claims relating to Mrs Brindley's employment with the DWP and any other claim in relation to her employment (save for accrued pension entitlements and claims for latent personal injury).

In June 2015, Mrs Brindley brought a further disability discrimination claim (Claim 2). Claim 2 related to another final written warning issued to Mrs Brindley under the attendance management policy in December 2014. Mrs Brindley alleged on this occasion that being moved to a new workstation had led to her arm going into severe spasm necessitating time off work sick.

An employment tribunal found it did have jurisdiction to hear Claim 2 as the COT3 only specified Claim 1 and all other relevant claims "arising from the facts of the Proceedings". The employment judge determined that this phrase referred to any claims arising from the first final written warning and the dispute over the parking space. It could not reasonably be taken to include the second final written warning and the dispute concerning the workstation. The tribunal found that Claim 2 was "a separate claim about a different warning in a different time frame".

The EAT agreed and dismissed the appeal by the DWP. It did not accept the argument of the DWP that "the facts of the Proceedings" included any application of the attendance management policy to Mrs Brindley.

Employers will be aware that a COT3 (and for that matter a settlement agreement) will only act to waive claims which are specified in the agreement. It is important that the wording of the agreement is clear and specifies all claims intended to be waived by the agreement.

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